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IN THE

Supreme Court of the United States

October Term, 1968
No. 326

SAMSON MARKET COMPANY, INC., a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,

Appellees.

Appeal From the Decision of the Court of Appeal of the State of California, Second Appellate District, Division One, 2d Civil No. 32647 and of the Decision of the California Supreme Court.

MOTION TO AFFIRM OR DISMISS.

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Appellees.

Appeal From the Decision of the Court of Appeal of the State of California, Second Appellate District, Division One, 2d Civil No. 32647 and of the Decision of the California Supreme Court.

MOTION TO AFFIRM OR DISMISS.

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal filed herein be dismissed and that the final judgment of the Court of Appeal of the State of California be affirmed on the grounds that the case does not present any substantial federal questions and upon the further ground that the appeal, in part, is not within the jurisdiction of the court.

Statement of the Case.

Appellees accept as accurate the statement of facts contained in the jurisdictional statement and in the opinion of the Court of Appeal of the State of California in 2d Civil No. 32647, 261 A.C.A. 659, 68 Cal. Rptr. 130 (1968).

Questions Presented.

1. Do the provisions of Rule 65 of the California Department of Alcoholic Beverage Control respecting the surrender and cancellation of inactive licenses violate due process?

2. Under the circumstances of this case was it a violation of due process for the California Department of Alcoholic Beverage Control to refuse to indefinitely extend appellant's inactive license to sell alcoholic beverages?

ARGUMENT.

I.

The Provisions of Rule 65 of the Department of Alcoholic Beverage Control Respecting the Surrender and Cancellation of Inactive Licenses Do Not Violate Due Process.

A. The Department Was Acting Within the Authority Vested in It by California Law in Enacting Rule 65.

The rule which is the subject of the instant appeal is an administrative regulation adopted by the California Department of Alcoholic Beverage Control pursuant to the authority vested in it by article XX, section 22 of the California Constitution. Appellant suggests that Rule 65 is not properly founded upon any authority vested in the department. However, the question of the department's authority under state law is not a federal question and the existence of the department's authority to enact the rule would appear to be settled by the decision of the Court of Appeal. Moreover, in an earlier case the California Court of Appeal had approved Rule 65 as a reasonable exercise of the department's rule-making authority. *Joseph George, Distr. v. Dept. Alc. Control,* 149 Cal. App. 2d 702, 705; 308 P. 2d 773 (1957).

B. Rule 65 Does Not Grant Unfettered Power to the Department to Cancel an Alcoholic Beverage License Without Cause or Justification.

In making its claim that Rule 65 authorizes the department to cancel its license without cause or justification petitioner seems to ignore the fact that the pro-

visions of the rule itself would be cause for cancellation of its license provided that the rule is not so arbitrary or discriminatory as to violate due process. *Williamson v. Lee Optical Co.,* 348 U.S. 483, 486-88 (1955); *Securities Comm'n v. Chenery Corp.,* 332 U.S. 194, 207 (1947).

The principle embodied by Rule 65 is that an alcoholic beverage license may not be retained in an inactive state but must remain associated with a bona fide business. The need for the rule results from the two principle characteristics of alcoholic beverage licenses in California; their transferability and their limitation in numbers. Alcoholic beverage licenses are issued to a particular person to do business at a particular place. Cal. Bus. & Prof. Code § 24040. Both the applicant and the place at which he does business must qualify for the license. *Cf. Koss v. Dept. Alcoholic Beverage Control,* 215 Cal. App. 2d 489; 30 Cal. Rptr. 219 (1963) [qualification of place]; *Jack P. Meyers, Inc. v. Alcoholic Bev. etc. Appeals Bd.,* 238 Cal. App. 2d 869, 48 Cal. Rptr. 259 (1965) [qualification of person]. Also, some licenses are limited in number. For example, appellant possesses an off-sale general license, which permits the retail sale of all types of alcoholic beverages. The number of such licenses which may be issued is strictly limited to one for every 2,500 people in each county. Cal. Bus. & Prof. Code § 23817. The number of new licenses which may be issued in any one year to allow for population increase is limited to 10% of the

outstanding licenses or 25, whichever is less. Cal. Bus. & Prof. Code § 24070(b).

As the result of the limitation of the number of licenses which may be issued, it is of utmost importance to keep all licenses attached to an active business, for every inactive license deprives a potential licensee of the chance to enter the alcoholic beverage business. Thus, quite apart from Rule 65, the California courts have held that a license which is not associated with an active business may be revoked upon the Constitutional grounds that its continuance would be contrary to public welfare or morals. *Gore v. Harris,* 229 Cal. App. 2d 821, 825-28; 40 Cal. Rptr. 666 (1964).

Rule 65 mitigates the effect of the general rule permitting revocation of an inactive license since it grants extra time to a licensee in which to make arrangements for the disposal or reactivation of his business. It also assures the department of the location and proper custody of the license and avoids the need to immediately proceed to revoke the license by accusation. Subparagraph (d) of Rule 65 expresses the department's reasonable judgment that a licensee should be able to reactivate a license within six months and that a further delay, in the absence of special justification, would unnecessarily restrict the freedom of entry of other applicants for a license.

C. Due Process Does Not Require That the Department Hold a Hearing Prior to Cancelling an Inactive License Which Has Been in Its Custody for Six Months Pursuant to Rule 65.

At the outset it must be observed that the appellant has not at any stage of these proceedings requested the department to grant it a hearing nor has it requested the California courts to order the department to grant it a hearing.

Not every act of an administrative agency respecting the issuance or cancellation of a license must be based upon an administrative hearing. For example, no hearing is required to deny a license when an applicant has failed to pass an examination or to cancel a license which has not been renewed. An evidentiary hearing is required only when there are factual issues to be resolved. *Sun Oil Company v. Federal Power Commission,* 256 F. 2d 233, 240-41 (5th Cir., 1958), *cert. denied;* Davis, *Administrative Law Treatise,* §§ 7.01-7.03. Within the ordinary context of Rule 65(d) the existence of any disputable fact is completely impossible. The only fact with which a cancellation under Rule 65(d) is concerned is the continuous inactivity of a license for a period of six months. With respect to a license which has already been surrendered to the custody of the department and remained in the department's custody for a period of six months, as in the instant case, there can be no factual dispute that the conditions of the rule have been met. Moreover, the licensee is assured of notice of the department's action since he has already voluntarily surrendered his license pursuant to subparagraph (a) of Rule 65 with knowledge of the rule's provisions.

II.

It Was Not a Denial of Due Process for the Department to Refuse to Indefinitely Extend the Time During Which Appellant Could Retain Its Inactive License.

A. This Issue Is Not Within the Court's Appellate Jurisdiction Under 28 U.S.C. § 1257(2).

The second of the "questions presented" in the jurisdictional statement asks,

> "Was the refusal of the Department to extend the period of time on which to cancel the license so arbitrary and capricious as to amount tm a denial of property without due process of law?"

The appellate jurisdiction of the court under 28 U.S.C. § 1257(2) is limited to cases in which the Constitutionality of a state statute has been sustained. Clearly, the second "question presented" in the jurisdictional statement does not involve the Constitutional validity of Rule 65. Therefore, it should be treated as though it were contained in a petition for writ of certiorari. 28 U.S.C. § 2103.

B. The Department of Alcoholic Beverage Control Did Not Act Arbitrarily or Discriminatorily in Refusing to Indefinitely Extend Appellant's Inactive License Merely Because Such Refusal Might Render Moot Pending Appeals by Appellant From Other Decisions of the Department Revoking Its License.

The heart of the instant case involves appellant's claim that cancellation of its license under Rule 65(d) will render moot three pending appeals from orders suspending and revoking appellant's license. The essence of appellant's argument is that the United States

Constitution compels the department to permit appellant to retain its inactive license until the pending cases have been finally resolved or, in the alternative, to permit appellant to transfer its license to a third party.

The Constitution does not compel the department to permit appellant to indefinitely retain its license in an inactive state merely because there are pending appeals from orders revoking appellant's license. Such a right to an indefinite extension does not exist in behalf of licensees who are not involved in pending disciplinary proceeedings. *Joseph George, Distr. v. Dept. Alc. Control,* 149 Cal. App. 2d 702, 308 P. 2d 773 (1957). Appellant does not advance any reason why it should be accorded a privilege not available to those whose license is free of disciplinary action.

The question before the court is whether the department's refusal to indefinitely extend appellant's inactive license was so arbitrary or capricious as to amount to a denial of due process. On the contrary, it appears that the granting of appellant's request would amount to a denial of equal protection to those inactive licensees against whom disciplinary action is not pending. Under the circumstances the department's refusal to indefinitely extend appellant's license cannot be deemed arbitrary or capricious.

It must be remembered that there is no connection between cancellation of appellant's license under Rule 65(d) and the outstanding orders of revocation pending against its license. There has been no claim by appellant that Rule 65(d) is being enforced against it any differently than against any other licensee. Unless the time for cancellation of a license is extended, cancella-

tion under Rule 65(d) is a ministerial and automatic act, akin to cancellation of a license for failure to pay an annual renewal fee. No one would suggest that a licensee is entitled to maintain a license in effect without payment of required fees or compliance with other basic requirements merely because there are outstanding disciplinary proceedings against its license which have not yet completed their circuit through the appellate courts.

The department was also not required by the United States Constitution to indefinitely extend appellant's inactive license until transferred to another party for the reason that the department is not compelled to permit such a transfer. In its letter to petitioner of December 21, 1967, the department informed appellant that a license may not be transferred to another person while there are pending accusations against it. Although the statement in the letter does reflect the policy of the department, it must be observed that in the instant case appellant never made a formal request for transfer of the license and the department was never called upon to formally approve or deny such a request.

The department's policy against transfer of licenses against which accusations are pending is based upon its inherent right to retain jurisdiction over the license and the licensee so long as the license exists and the case is pending. Appellant states that denial of his request will deny him the possible fruits of an appellate victory with respect to the pending accusation. On the other hand, if the department were required to permit a transfer to a third party while an accusation were pending it would be deprived of its right to impose disciplinary action against appellant, and any licensee

could avoid the threat of disciplinary action by merely transferring his license. Under California law a pending order of disciplinary action follows a transferred license and once the disciplinary action becomes final the penalty must be imposed against the transferee. *Maxwell Cafe v. Dept. Alcoholic Control,* 142 Cal. App. 2d 73, 80; 298 P. 2d 64 (1956). Surely no one is going to pay $17,000 for a license which is subject to revocation. In practice licenses against which disciplinary actions are pending could be transferred only if the department would be willing to dismiss the charges. Then if the transferor were to seek a new license the department would be compelled to reopen the case, perhaps at a time when the evidence had become stale.

In view of these considerations the refusal of the department to indefinitely extend appellant's license until the pending disciplinary action becomes final or until the license has been transferred cannot be said to be so arbitrary and capricious as to constitute a violation of due process.

C. In Denying Appellant's Request to Indefinitely Extend Its Inactive License the Department Was Not Required to Prove by Evidence That Such an Extension Would Be Contrary to Public Welfare or Morals.

Appellant argues that it should have been given an opportunity to defend itself in a hearing and the department should be required to prove that continuance of its license would be contrary to public welfare and morals. As we have already observed appellant has never requested a hearing either from the department or from the courts. We have further already observed that a hearing is not required prior to cancella-

tion of a license under Rule 65(d) since there are no disputable facts to be resolved. Under California law continuance of a license which has been surrendered to the custory of the department for a period of six months is contrary to public welfare or morals as a matter of law. There is no charge to refute and no answer to be heard.

The question of whether appellant is entitled to a hearing on its request for extension of its inactive license is a separate one. Here again appellant has never requested a hearing from the department or from the court. And, as we have already observed, appellant did not base its request for an extension upon any disputed factual assertions. Thus, no evidentiary hearing would be required.

It would appear that the party seeking an exception to a general rule ought to be the one to bear the burden of proof as to whether the exception should be granted. However, within the context of the instant case the question is moot since no hearing was requested and there were no factual issues to be resolved.

D. Appellant Did Not Fall Into a Trap Set for It by the Department When It Voluntarily Surrendered Its License Under Rule 65(a).

In the closing paragraph of its brief appellant states,

> ". . . To lose its license on the basis of the trap it fell into by surrendering its license is unjust. . . ."

However, there is nothing in the record in this case to indicate that appellant was trapped or tricked by the department into surrendering its license.

Appellant has never claimed that it was unaware of the provisions of Rule 65(d) respecting cancellation of licenses at the time that it voluntarily surrendered its license to the custody of the department under Rule 65(a) nor has appellant claimed that it was unaware of the department's policy respecting transfer of licenses against which disciplinary action is pending. Appellant has been represented by competent and experienced counsel at all stages of the proceedings which are subject of this case and any speculation that it was the victim of ignorance or stealth seems quite unwarranted.

Moreover, appellant has not been prejudiced by voluntarily surrendering its license to the custody of the department. Had appellant failed to voluntarily surrender its license the department could have proceeded to revoke the license by accusation. In such an eventuality appellant would have lost its right to reinstate the license by renegotiating its lease or by acquiring a new premises within six months.

Conclusion.

For the reasons stated hereinabove, the issues raised by appellant in its jurisdictional statement raised no substantial federal question and, in part are not the subject of the court's appellate jurisdiction. Therefore, the appeal should be dismissed and, in the alternative, a writ of certiorari should be denied.

Respectfully submitted,

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